# Supreme Court of the United States

OCTOBER TERM, 1947

---

**No. 706**

---

A. N. CONE, PETITIONER,

*versus*

WEST VIRGINIA PULP AND PAPER COMPANY,
RESPONDENT

---

## BRIEF IN OPPOSITION TO CERTIORARI

---

CHRISTIE BENET,
J. B. S. LYLES,
Columbia, S. C.,

D. A. BROCKINTON,
CHARLES W. WARING,
Charleston, S. C.

Attorneys for Respondent,
West Virginia Pulp and
Paper Company.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

## INDEX

## TABLE OF CASES

# Supreme Court of the United States

OCTOBER TERM, 1947

---

**No. 706**

---

A. N. CONE, PETITIONER,

*versus*

WEST VIRGINIA PULP AND PAPER COMPANY,
RESPONDENT

---

## BRIEF IN OPPOSITION TO CERTIORARI

---

**I. This Court has already denied a motion to recall and amend the mandate in this case, 331 U. S. 794, 91 L. Ed. 1822.**

On page 26 of petitioner's brief this statement appears "The scope and effect of the opinion of this Court on certiorari • • • has not heretofore been brought before this Court or before the Court of Appeals." On May 21, 1947, plaintiff-petitioner served notice of his motion whereby this Court was asked to recall and amend its mandate. This motion was made a part of the record on the second appeal to the court below, review of which is hereby petitioned for, by paragraph three of the stipulation of counsel.

This Court was requested by the motion to:

1. Issue a memorandum opinion holding in effect that the Court of Appeals was without jurisdiction on the first appeal because defendant had not made a motion for a new trial following the trial in the District Court, as required by Rule 50(b)—(Grounds 1 and 5 of motion);

2. Require the District Court to issue execution on the original judgment in favor of plaintiff—(Ground 2); and

3. Direct the District Court to levy execution against defendant for plaintiff's costs in the Supreme Court without regard to any offset of costs awarded defendant in the Court of Appeals (Ground 3).

In other words, the motion was based on the theory that this Court had ordered the original judgment of the District Court in favor of plaintiff reinstated. The motion covered both points decided by Judge Waring in the District Court in the order from which the second appeal was taken (R., 18), on the theory advanced by plaintiff, to wit, that the Court of Appeals was without jurisdiction on the original appeal because defendant had not made a motion for a new trial following the verdict in the District Court, when (as plaintiff contended on the motion) this was required by Rule 50(b).

The allegation of the motion that defendant had failed to make a motion for a new trial following the trial in the District Court, was shown by defendant to be *contra* the fact by a certificate of the clerk of the District Court dated May 23, 1947, and by an order of Judge Waring dated December 3, 1945, which were attached to defendant's brief in opposition to the motion as Exhibits "B" and "C" respectively; see R., 24.

The motion to recall and amend was supported by a printed brief of some fourteen pages, whereby this Court

was urged to grant all grounds of the motion. The motion was denied June 16, 1947, in the following words: "The motion to recall and amend the mandate is denied." 331 U. S. 794, 91 L. Ed. 1822. The Court is respectfully referred to respondent's brief in opposition to the motion for pertinent authorities as to the proper construction of the mandate.

The brief for petitioner-appellant on the second appeal, in effect asked the Court of Appeals to make a like ruling as to the construction and effect of the mandate of this Court. But the brief of respondent-appellee pointed out that this was not a new issue arising in the District Court that was outside of the scope of the mandate of this Court, so that the Court of Appeals had no jurisdiction of such a question, citing *Ohio Oil Co. v. Thompson* (C. C. A. 8), 120 F. (2) 831, Cert. Den. 314 U. S. 658.

**II. A motion for a new trial is not a condition precedent to the taking of an appeal under federal procedure.**

Petitioner now concedes that a motion for a new trial was made by respondent as defendant in the District Court (since we had shown by the record that this was so), but argues that the grounds on which the Court of Appeals reversed the judgment of the District Court on the first appeal were not set forth in that motion for a new trial and that, as a consequence, the Court of Appeals was without jurisdiction to reverse on these grounds.

In our brief in opposition to the motion we cited the following cases in support of the proposition that such a new trial rule does not exist in federal procedure and that the Conformity Act does not apply to such a rule: *Aaron v. U. S.* (C. C. A. 8), 155 F. 833, 838; *Boatmen's Bank v. Trower Bros. Co.* (C. C. A. 8), 181 F. 804, 806; *Chicago Life Ins. Co. v. Tierman* (C. C. A. 8), 263 F. 325, 330.

We have since found the following additional authorities supporting those citations: In the article on "Federal Courts" in 36 C J. S., 265, it is said: "While a contrary rule prevails in some jurisdictions under state practice, as appears in Appeal and Error, Sections 352-388, a motion for a new trial is not a condition precedent to the taking of an appeal under the federal practice." *Chicago Life Ins. Co. v. Tiernan, supra,* is cited in support thereof, and also *American Distilling Co. v. Wisconsin Liquor Co.* (C. C. A. 7), 104 F. (2d), 582, 589, wherein the Court says: "As to defendant's second procedural point it is sufficient to say that a motion for a new trial is not a condition precedent to the taking of an appeal under federal procedure in Federal Courts."

**III. Petitioner has waived any right to complain as to offset of costs.**

The record of the clerk of the District Court shows that counsel for petitioner accepted and endorsed the clerk's check for $162.04, representing the balance due plaintiff after the offset of costs, and that the check was cashed prior to September 30, 1947. R., 27-30.

Respectfully submitted,

CHRISTIE BENET,
J. B. S. LYLES,
Columbia, S. C.,
D. A. BROCKINTON,
CHARLES W. WARING,
Charleston, S. C.,
Attorneys for Respondent,
West Virginia Pulp and
Paper Company.